No. 97-634

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF CORRECTIONS, et al.,
Petitioners,
v.
RONALD R. YESKEY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF AMICI CURIAE THE NATIONAL ADVISORY GROUP FOR JUSTICE, AMERICAN FOUNDATION FOR THE BLIND, DISABILITY RIGHTS COUNCIL OF GREATER WASHINGTON, NATIONAL ALLIANCE FOR THE MENTALLY ILL AND NATIONAL ASSOCIATION FOR PEOPLE WITH AIDS IN SUPPORT OF RESPONDENT

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INTERESTS OF AMICIC CURIAE

Amicus curiae National Advisory Group for Justice has been granted consent to participate in the briefing by all the parties and is joined by *amici curiae* American Foundation for the Blind, Disability Rights Council of Greater Washington, National Alliance for the Mentally Ill, and National Association for People with AIDS. All these *amici curiae* are deeply familiar with our Nation's history of invidious discrimination against individuals with disabilities and with the various legislative efforts to redress this discrimination, particularly the Americans with Disabilities Act, 42 U.S.C. §§ 12101- 12213 (ADA) (1990).[1]

The *amici curiae* are: organizations comprised of persons with disabilities and their families; organizations instrumental in the drafting and enactment of the ADA and other civil rights legislation; organizations involved on a daily basis in shaping national policy on disability and other anti-discrimination issues, including the implementation of the ADA; and, organizations advocating for the rights and interests of persons with disabilities. A short description of each organization appears in the Addendum.

These organizations and their members have direct experience with the state sponsored discriminatory activities and attitudes which informed Congress in its drafting of the ADA. They have a direct stake in the interpretation of the Act, including both its scope and its constitutionality. Finally, these organizations and their members include families with loved ones in prison who would be immediately and negatively affected by the limitations proposed by the petitioners in this case.

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[1]No Counsel for a party authored this brief in whole or in part. no person or entity other than the *amici curiae*, its members, and its counsel made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Throughout the history of our Nation, individuals with disabilities have been subjected to a regime of segregation, invidious discrimination, and exclusion. That regime is reflected in a tapestry of state laws, policies, and practices. It reveals a legacy of state sponsored and codified prejudice grounded in stereotypes and inaccurate perceptions of the abilities and limitations of many of our citizens. Despite piecemeal legislative efforts to eradicate these deeply-rooted patterns of discrimination over five decades, the regime has remained pervasive and wide-spread. Congress sought to redress this national problem with the passage of the ADA.

Congress, the voice of the States speaking in unison on issues that affect the Nation, is a body of duly elected representatives of the people. Congress passed the Americans with Disabilities Act to move existing Constitutional protections within the grasp of individuals with disabilities and remedy the effects of the invidious discrimination that had become their legacy. In plain language, Congress intended that the Act reach any State or local government department or agency, including the Pennsylvania Department of Corrections.

Amici curiae recognize that State prisons are penal institutions, the responsibility for and management of which are peculiarly within the province of the legislative and executive branches of the respective States, and do not suggest otherwise in its argument. The administrators of State prisons must overcome Herculean obstacles as they seek to maintain order and discipline, secure their institutions, and rehabilitate, to the extent possible, the inmates placed in their custody. *Amici* in no way seek to minimize or reassign those task nor do they portend to seek special privileges

for persons with disabilities.

Amici merely ask that this Court consider only that Ronald Yeskey asked to participate in a program established and implemented by administrators of the Pennsylvania Department of Corrections to the same extent as his similarly situated non-disabled peers. Ronald Yeskey was not allowed to participate solely on the basis of his disability. Petitioners' denial is consistent with reports that persons with disabilities receive longer and harsher sentences, serve more of their sentences than do their non-disabled peers and are more unlikely to receive any habilitation while incarcerated.[2]

ARGUMENT

I. PETITIONERS' ATTEMPT TO EXEMPT PRISONS FROM THE ADA IS INCONSISTENT WITH THE PRIMARY PURPOSE OF CONGRESS TO CREATE A COMPREHENSIVE STATUTE THAT WOULD ROOT OUT UNCONSTITUTIONAL DISCRIMINATION AGAINST PEOPLE WITH DISABILITIES IN EVERY ASPECT OF AMERICAN SOCIETY.

The ADA was the culmination of a prolonged legislative initiative begun in earnest more than twenty years earlier with the passage of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which prohibits discrimination in any program or activity -- including programs operated by State agencies -- that receives Federal financial assistance.[3] Congress intended the Rehabilitation

[2]See, e.g., J. Ellis & R. Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L.Rev. 414, 479-480 (1985).

[3]In addition to the Rehabilitation Act, the ADA was built on the foundation established by Congress through the enactment of numerous other statutes in the two decades preceding the ADA that prohibited discrimination against

Act to cure the Nation's "failure to recognize the intrinsic rights of the handicapped." Timothy M. Cook, *The Scope of the Right to Meaningful Access and the Defense of Undue Burdens Under Disability Civil Rights Laws*, 20 Loy. L.A. L. Rev. 1471, 1478 (1987). Three years of hearings prior to the enactment of § 504 made clear to the lawmakers that "although accessibility would entail burdens, eliminating the evil of exclusion would economically and morally outweigh the costs." *Id.* at 1478-79.

Despite the intent behind the Rehabilitation Act to extend protection to persons with disabilities, discrimination persisted. After extensive consideration of continuing and pervasive discrimination faced by people with disabilities, Congress came to the conclusion that existing federal and state laws were not adequate, that its piecemeal approach to legislating in different

people with disabilities. These included: the Education for All Handicapped Children Act, 20 U.S.C.§§ 1401-1485 (1970), enacted despite this Court's opining that "[Education] is perhaps the most important function of state and local governments...required in the performance of our most basic public responsibilities" *Brown v. Bd of Educ.*, 347 U.S. 483, 493 (1954), and in the wake of judicial decisions holding that the exclusion of children with disabilities from public schools violated the Equal Protection Clause; the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000-6083 (1994) (amending Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963), enacted because Congress found that government funded agencies "tend to overlook or exclude persons with developmental disabilities in their planning and delivery of services," § 6000(a)(4), and which required States to assure protection of civil rights and the provision of treatment, services, and habilitation; the Fair Housing Amendments Act, 42 U.S.C. §§ 3601-3631 (1988), that prohibits discrimination on the basis of disability in the sale or rental of housing; the Architectural Barriers Act, 42 U.S.C. §§ 4151-4157 (1968), that requires federally funded or leased buildings to be accessible; the Urban Mass Transportation Act, 49 U.S.C. §§ 1612-1625 (1970) (repealed July 5, 1994), requiring eligible jurisdictions to provide accessibility plans for mass transportation; and the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 (1980), which gives discretionary authority to the U.S. Attorney General to bring an action against "any State or political subdivision of a State official, employee, or agent thereof, or other person acting on behalf of a state for depriving institutionalized persons of rights secured under the constitution or federal laws." 42 U.S.C. § 1997a(a).

substantive areas was ineffective and confusing, and that comprehensive federal legislation was imperative to protect all people with disabilities against all forms of discrimination, whether public or private. H.R. Rep. No. 101-485, pt. 2, at 47-48, *reprinted in*, 1990 U.S.C.C.A.N. at 330.[4] As Attorney General Richard Thornburgh, speaking on behalf of President Bush, told Congress:

> One of its (the ADA's) most impressive strengths is its comprehensive character. Over the last 20 years civil rights laws protecting disabled persons have been enacted in a piecemeal fashion. Thus, existing federal laws are like a patchwork quilt in need of repair. There are holes in the fabric, serious gaps in coverage that leave persons with disabilities without adequate civil rights protection.

H.R. Rep. No. 101-485, pt. 2, at 48; S. Rep. No. 101-116, at 19 (1989).[5]

The need for additional comprehensive Federal legislation was also recognized by State officials who testified about the ADA before Congressional committees. For example, the Committee Reports cite the testimony of Neil Hartigan, the Attorney General from Illinois, who stated:

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[4]*See City of Cleburne, Texas v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 443 (1985) (six years prior to these hearings, this Court recognized the need for Federal legislative protections for persons with disabilities because of the historical failure of states to ensure individual rights).

[5]The Committee Reports also point out that the need for omnibus legislation was one of the major recommendations made by the National Council on Disability in its two reports to Congress, and was recommended by the President's Commission on the HIV Epidemic, as well. H.R. Rep. 101-485, pt. 2, at 48; S. Rep. No.101-116, at 19.

> Under the current federal law, the Rehabilitation Act's non-discrimination requirements are tied to the receipt of federal financial assistance. Unfortunately, what this translates to is total confusion for the disability community and the inability to expect consistent treatment. Where there is no state law prohibiting discriminatory practices, two programs that are exactly alike, except for funding sources, can treat people with disabilities completely differently from those who don't have disabilities.

S. Rep. No. 101-116, at 12.[6] Congress' intent was to ensure that all decisions based on disability, public or private, were guided by facts, not myths, fears, and stereotypes. As Senator Dole stated:

> We have included in this legislation all people with all disabilities, no matter how misunderstood, because that is what this bill is about--replacing misunderstanding with understanding.

136 Cong. Rec. S 9695 (July 13, 1990) (statement of Sen. Dole).

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[6]Further evidence of State support for the ADA came from the Chairman of the President's Committee on the Employment of Persons with Disabilities who informed Congress that:

> the fifty State Governors' Committees, with whom the President's Committee works, report that existing State laws do not adequately counter such acts of discrimination." S. Rep. No. 101-116, at 18.

Congress also had evidence that the States would not eliminate discrimination on their own. The Committee Reports cite the testimony of Admiral James Watson, Chairperson of the President's Commission on the HIV Epidemic, who stated:

> [E]nough time has, in my opinion, been given to the States to legislate what is right. Too many States, for whatever reason, still perpetuate confusion, It is time for Federal action. *Id*.

A. States Have Historically Sponsored, Supported, and Enacted Policies Which Purposely Discriminate Against Persons With Disabilities.

Congressional consideration of the ADA took place against an historical backdrop of longstanding State sponsored discrimination against people with disabilities that can only be called "grotesque." *Cleburne*, 473 U.S. at 438. This discrimination arose not only from deep-seated prejudice against individuals with disabilities, but from archaic laws that reflect inaccurate stereotypes about disabilities. *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 279 (1987). For example, during the early part of the 20th century, practically every state adopted a policy of segregating and isolating individuals with disabilities for life in massive custodial institutions. *Cleburne*, 473 U.S. at 461-462 (Marshall, J., concurring and dissenting in part). The States actively inculcated fear of mentally retarded persons and undertook major outreach efforts to identify and remove them from the community. The State of Pennsylvania excluded mentally retarded children from public schools by enacting laws which relieved the State Board of Education "from any obligation to educate a child whom a public school psychologist certifies as uneducable and untrainable." *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F.Supp. 279, 282 (E.D. Pa. 1972).

The virulence and bigotry directed by the States towards people with disabilities "rivaled, and indeed paralleled, the worst excesses of Jim Crow." *Cleburne*, 473 U.S. at 461, (Marshall, J, concurring and dissenting in part). People with disabilities were blamed for all of society's worst evils, from crime to poverty. The goal was not merely to separate them from the community, but to prevent them from reproducing so as to literally "nearly extinguish their race." *Id.* at 462 (citing A. Moore, *The Feeble-Minded in*

New York 3 (1911)). "To assure this end, twenty-nine states enacted compulsory eugenic sterilization laws between 1907 and 1931." *Id.* at 463 (citing J. Landman, *Human Sterilization* 302-303 (1932)). State legislation also prohibited people with mental retardation from marrying. Similar laws were directed at individuals with epilepsy and mental illness. Most states categorically disqualified "idiots" and other persons labeled as disabled from voting, without regard to individual capacity and with discretion to exclude left in the hands of low-level election officials. *Id.* at 464.

Although one might have hoped that archaic state laws and practices that blatantly discriminated against people with disabilities would have disappeared by the 1980's, this was not the reality confronting Congress as it began to draft the ADA. For example, even in 1983 fifteen states still had laws authorizing the compulsory sterilization of individuals with mental illness or retardation, and at least four states authorized the sterilization of persons with epilepsy.[7] Thousands of individuals with disabilities remained unnecessarily segregated in large institutions where abuse by staff, and other dangerous physical conditions, were common. *U.S. Commission Report* at 33-35. Moreover, people with disabilities continued to be denied basic civil rights that other citizens take for granted. For example, many states unjustifiably restricted the right of persons with disabilities to vote, to hold public office, or to obtain a license to hunt or fish. *Id.* at 40. Many states also

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[7] *U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Disabilities* at 37 (1983) [hereinafter *U.S. Commission Report*]. As petitioners recognize the *U.S. Commission Report* was heavily relied upon by Congress in assessing the nature and extent of the discrimination that still existed against persons with disabilities. Petitioners' Brief at 16-17. The Report was entered into testimony before House and Senate subcommittees and was quoted in the Committee Reports of the Senate Comm. on Labor and Human Relations, S.Rep. No. 101-116, at 8 (1989) and the House Comm. on Educ. and Labor, H.R. Rep. No. 101-485, pt. 2, at 28, 31 (1990).

prohibited individuals with disabilities from marrying or entering into contracts. *Id.* Indeed, several states continued to make marriages of the mentally retarded a criminal offense. *Cleburne*, 473 U.S. at 463. Many states mandated that parents with disabilities surrender their children through unjustified proceedings to terminate parental rights. *U.S. Commission Report* at 40, 167. Governmental discrimination was pervasive throughout the criminal justice system.[8] *Id.* at 168.

B. *Congress Carefully Considered This History of Unconstitutional Discrimination When It Drafted the ADA.*

Before enacting the ADA, Congress carefully explored the problems of discrimination against people with disabilities. It conducted numerous hearings on the ADA and considered testimony by hundreds of people about discrimination across the entire spectrum of governmental functions, including education, voting, public health, transportation, communication, judicial, and law enforcement such as police, courts, and jails. In its extensive deliberations on the ADA,[9] Congress also reviewed authoritative governmental, public health, and census reports which studied the

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[8]Massachusettss, for example, categorically prohibited mentally disabled patients from seeking parole, even though the courts had long since declared that such laws violate the Equal Protection Clause. See *Mass. Gen. Laws* ch. 127, § 133A. See also *Sites v. McKenzie*, 423 F.Supp. 1190 (N.D. W.Va. 1976); *People v. Agnew*, 68 Misc.2d 128, 133-134; 326 N.Y.S.2d 477, N.Y. Sup. Ct. (1971).

[9]The Senate Committee on Labor and Human Resources and the Senate Subcommittee on the Handicapped held five hearings on the bill. On September 7, 1989, the bill passed the Senate with overwhelming support by a vote of 76 to 8. In the House, over twenty hearings were held before four House committees' subcommittees. The House and Senate Conference Committee convened twice. The conference bill passed by an overwhelming majority in both the House (by a vote of 377 to 28) and the Senate (by a vote of 91 to 6). The ADA was signed by President Bush on July 26, 1990.

status of people with disabilities, all of which concluded that comprehensive civil rights legislation was necessary to combat pervasive discrimination against people with disabilities.[10]

Contrary to petitioners' claim, however, the report does not focus simply on the warehousing of disabled people in segregated institutions. It also describes discrimination in more than 20 broad categories of state provided or supported programs or services, and refers specifically to prisons and jails as settings for discrimination. The report explicitly identifies eight distinct types of discrimination by the criminal justice system, including:

> Disproportionate number of mentally retarded people in prisons and juvenile facilities; Improper handling and

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[10] Both the House and the Senate cited seven substantive studies or reports to support the conclusion that discrimination against the disabled is a serious and pervasive problem. S.Rep. No. 101-116, at 6; H.R.Rep. No. 101-485, pt. 2, at 28 (both citing National Council on the Handicapped: On the Threshold of Independence (Jan.1988) (updating the legislative changes recommended in Toward Independence)); Report of the President's Commission on the HIV Epidemic (June 1988) (reviewing the medical, financial, ethical, policy, and legal issues that affect those afflicted with HIV); Louis Harris and Associates, Employing The ICD (International Center for the Disabled) Survey II: Disabled Americans (1987) (surveying 210 top managers, 301 equal employment managers, 210 department heads and line managers, and 200 top managers in companies employing 10-49 people); Louis Harris and Associates, The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream (March 1986) (surveying 1000 disabled persons); National Council on the Handicapped, Toward Independence (Feb.1986) (reviewing different laws and programs that affect disabled persons and offering recommendations for legislative changes); U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities (Sept.1983) (reporting on, among other things, the history, nature, and extent of discrimination against the disabled); From ADA to Empowerment: The Report of the Task Force on the Rights and Empowerment of Americans with Disabilities (Oct. 12, 1990) (compiling findings and recommendations following the formation of a Task Force, which conducted 14 Washington, D.C., teleconference meetings with participants from across the country, held 63 public forums in the 50 states and some territories, held other meetings involving 25,000 participants, testified in congressional hearings, met with legislative and executive staff members, met with the President, Vice President and various Cabinet members, and met with opponents of the ADA).

> communication with handicapped persons by law enforcement personnel; Insufficient availability of interpreters; Inadequate treatment and rehabilitation programs in penal and juvenile facilities; Inability to deal with physically handicapped accused persons and convicts, (e.g. accessible jail cells and toilet facilities); and, abuse of handicapped persons by other inmates.

U.S. Commission Report at 168.[11]

Title II was the least dramatic of the ADA's additions to existing law; its primary purpose was to extend to all State entities the non-discrimination requirements already applicable to most governmental agencies under § 504 of the Rehabilitation Act.[12] Nonetheless, as petitioners concede, Congress heard a wealth of

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[11]The legislative history of the Civil Rights Restoration Act of 1987, enacted to overturn the Supreme Court's 1984 decision in *Grove City College v. Bell*, 465 U.S. 555 (1984), shows that Congress understood that the Rehabilitation Act applies to prisons. The Senate Report explained the need for action as follows:

> Clear violations of federal law go uncorrected while students lose valuable educational benefits that can rarely be recovered and employees lose jobs or job opportunities. Prolonged debate takes place over what constitutes a "program or activity" under the civil rights law, while the universities, schools, and correctional facilities receive millions of federal dollars.

S. Rep. No. 64, 100th Cong., 1st Sess. 24 (1987) (emphasis supplied).

[12]See *M.C.* Weber, *Disability Discrimination By State And Local Government: The Relationship Between Section 504 Of The Rehabilitation Act and Title II of the Americans With Disabilities Act*, 36 Wm. & Mary L. Rev. 1089, 1117 (1995) (suggesting that Title II's legislative history is, in reality, a form of subsequent legislative history for section 504). Further, the ADA itself provides that "[n]othing in the ADA shall be construed to provide a lesser standard than the standard applied under Title V of the Rehabilitation Act." 42 U.S.C.§ 12201(a). The legislative history of Title II also displays strong support for § 504 and its regulations. *See*, H.R. Rep. No. 101-485, pt. 1, at 26.

testimony from a wide range of people, including "mothers, fathers, and children; from students and workers", who all "spoke eloquently about the daily problems they encounter in society as a result of their disabilities." Petitioners' Brief at 13. Congress heard powerful accounts of discrimination by many types of public entities, including the courts, schools, voting, police and fire departments, mental retardation institutions, as well as about prisons and jails.

For example, the House Reports describe discrimination against people with epilepsy in the criminal justice system:

> In order to comply with the non-discrimination mandate, it is often necessary to provide training to public employees about disability. For example, persons who have epilepsy, and a variety of other disabilities, are frequently inappropriately arrested and jailed because police officers have not received proper training in the recognition of and aid for seizures. Often, after being arrested, they are deprived of medications while in jail, resulting in further seizures. Such discriminatory treatment based on disability can be avoided by proper training.[13]

Similarly, Belinda Mason, a board member of the National Association of People with AIDS, testified:

> A man passing through a central Kentucky town was stopped for drunk driving. After he told the arresting officers that he had AIDS, the man's car was driven to a parking lot of the jail. Instead of putting the man in jail,

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[13]H.R. Rep. No. 101-485(III), at 50, *reprinted in* 1990 U.S.C.C.A.N. vol. 4, 473.

the officers locked him inside his car to spend the night. The car was eventually surrounded by sightseers, staring and pointing at the man.

A woman in another part of Kentucky had managed a school cafeteria for a number of years. Her adult son, who was living in California, became ill with AIDS. The woman went to California to bring her son home so she could care for him. But when she returned, she was abruptly fired from her job.[14]

Justin Dart, the Chairperson of the Task Force on the Rights and Empowerment of Americans with Disabilities, related the following account, which had been told to the Task Force by a service provider to hearing impaired individuals in Illinois:

> We have clients who have been arrested and held in jail over night without ever knowing their rights nor what they are being held for. We have clients whose children have been taken away from them and told to get parent information, but have no place to go because the services are not accessible. What chance do they ever have to get their children back?[15]

Cindy Miller, a Massachusetts rehabilitation counselor, testified about the abominable treatment of individuals with disabilities in state institutions and by police across the country:

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[14] *Americans with Disabilities Act of 1988: Joint Hearing on S.2345 Before the Senate Subcomm. on the Handicapped of the Comm on Labor and Human Relations*, 100th Cong., 2nd Sess. (1988).

[15] *Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Relations and the Subcomm. on the Handicapped*, 101st. Cong., 1st Sess. (1989).

> As a rehabilitation counselor, I have seen these institutions. The smell of human waste and detergent has stuck in my throat. I have looked into the vegetative eyes of its inmates in their sterile environments. . . . I have witnessed their jailers rationalize taking away their wheelchairs as a form of "punishment" -- as if that is different then punishing prisoners by breaking their legs. I have witnessed their jailers taking away their food as form of "punishment" -- as if that is different than starvation. I have witnessed their jailers talk about them in the third person and leave them naked to the public -- as if this doesn't strip them of their human dignity. We have laws to protect animals from these conditions, while Americans with disabilities continue to suffer.
>
> Crimes against Americans with disabilities is an ignored epidemic in America. The Police do not provide crime prevention, apprehension or prosecution because they see it as fate that Americans with disabilities will be victims. I have given up on police protection because of their attitude that Americans with disabilities are natural victims. Never was this so graphic as when an officer pointed his gun at my head, cocked it, and unknowingly to me pulled the trigger on an empty barrel because he thought it would be "funny" since I have quadraparesis and couldn't flee or fight.[16]

Other witnesses testified about government officials who deliberately excluded people with disabilities from the court

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[16] *Americans with Disabilities Act of 1988: Hearings on H.R. 4498 Before the House Subcomm. on Select Education of the Comm. on Education and Labor*, 100th Cong., 2nd Sess. (1988).

system, voting, and jury service.[17] For example, Emeka Nwojke, a Massachusetts resident, testified about his experience in court, where he went to pursue a complaint that he had been unlawfully discriminated against because of his disability:

> First of all, I could not get into the building because there were about 500 steps to get in there. Then I called for the security guard to help me, who happened to be a policeman. He told me there was an entrance at the back door for the handicapped people. . . . I readily agreed and I went to the back door. I went to the back door and there were three more stairs for me to get over to be able to ring a bell to announce my arrival so that somebody would come and open the door and maybe let me in. I was not able to do that. So, I was at the back door for an hour waiting for somebody to come back so I could call for help. This is the court system that is supposed to give me a fair hearing. It took me 2 hours to get in.[18]

Based on its exhaustive and meticulous consideration of this and similar testimony and reports, Congress made nine general Findings about the widespread discrimination against persons with disabilities that existed in virtually every aspect of society.[19] These

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[17] *Id.* Testimony of Nancy Turkin, executive director of the Center for Independent Living.

[18] *Id.* Testimony of Nancy Husted-Jensen, Chairman of the Governor's Commission on the Handicapped in Rhode Island. She recanted the Constitutional deprivation experienced by persons with disabilities who tried to vote. The Board of Election Commission's director told her that even though they were registered, voters with disabilities had been turned away at the polling place for "not looking competent."

[19] These findings include, *inter alia*, that 43,000,000 Americans with physical or mental disabilities have been isolated, segregated and discriminated against in such critical areas as employment, public accommodations,

Findings provide the rationale for the purpose, scope, and remedial standards of the ADA. They represent the factual and legal predicate for Congress' actions. They more than support Congress' conclusion that it was necessary to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(a). Not a single one of the Congressional Findings is incompatible or irrelevant to prisons.[20]

C. The Broad Scope of Title II of the ADA Was Designed to Address the History of Discrimination and Exclusion of Persons With Disabilities by States and State Entities.

The ADA's universal mandate applies to every agency and official of state government.[21] There is no exception for prisons or

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education, institutionalization, and access to public services; individuals who have been discriminated against on the basis of disability often have no legal recourse to redress discrimination that has tended to relegate them to lesser services, programs, activities, benefits, jobs, or other opportunities; the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and the continuing existence of unfair and unnecessary discrimination and prejudice denies them the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity. 42 U.S.C. § 12101(a).

[20] Contrary to petitioners' argument, the term "public services," as used in Finding 3 and in the heading of Title II, is not limited to services available to the general public. By definition, Title II, encompasses all the programs and services of a "public entity," many of which are not open to the general public. Further, the phrase "our free society" in Finding 9 is a reference to America's political tradition and values, and was hardly meant to draw a distinction between people in prison and those in the community.

[21] Title II prohibits discrimination in the "services, programs, or activities of a public entity," and defines a "public entity" to include "any department, agency, special purpose district, or other instrumentality of a State or States local government." 42 U.S.C. §§ 12131(1)(B), 12132 (1990).

any other unit of state government. In fact, Congress deliberately chose not to list all of the different state functions covered by Title II in order to ensure that there would be no gaps in its universal coverage of all units of state and local government.[22]

There is no merit to petitioners' contention that the "clear statement rule," articulated by the Court in *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), removes state prisons from the scope of Title II.[23] Even if the clear statement doctrine is relevant to the interpretation of a federal statute that impinges on the operations of a state prison, it only applies if the statute is ambiguous. *Salinas v. United States*, 118 S.Ct. 469, 475 (1997); *Hilton v. South Carolina Public Rys. Comm.*, 502 U.S. 197, 205-06 (1991); *Gregory*, 501 U.S. at 467. It does not permit the courts to take seriously every far-fetched interpretation of a statute offered by litigants. As the Court explained in *Salinas*:

> A statute can be unambiguous without addressing every interpretative theory offered by a party. It need only be "plain to anyone reading the Act" that the statute applies to the conduct at issue.

118 S.Ct. at 475 (quoting *Gregory*, 501 U.S. at 467). No matter how much the Federal statute may intrude on a traditional state function, a court "cannot press statutory construction to the point of disingenuous evasion." *Id.* (quoting *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, n.9 (1996)). Otherwise, the clear statement rule, "while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution." *United States v. Albertini*, 472 U.S. 675, 680 (1985).

The clear statement rule does not warrant a departure from the terms of Title II to exclude prisoners from its protection. No ordinary reader could plausibly conclude that the definition of "public entity" excludes a state department of corrections, or any other state entity for that matter.[24] When it uses language that is plainly comprehensive, Congress does not have to list by name each particular state function it intends to regulate.[25] *Gregory*, 501 U.S. at 467. As Judge Posner stated:

> We doubt, moreover, that Congress could speak much more clearly than it did when it made the Act expressly applicable to all public entities and defined the term "public entity" to include every possible agency of state or local government.

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[22]See H.R. 101-485, 101st Cong., 2d Sess., pt. 2, at 84.

[23]It is doubtful whether the "clear statement rule" has any applicability at all to Title II's regulation of state prisons. In *Gregory*, the Court justified its application of the rule, previously invoked only to assess a purported abrogation of Eleventh Amendment immunity, because the federal statute at issue impinged on a state constitutional provision governing the qualifications of state judges, a subject which "goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity." *Gregory*, 501 U.S. at 460. As Judge Posner stated in *Crawford v. Indiana Dep't. of Corrections*, 115 F.3d 481, 483 (7th Cir. 1997), *petition for cert. filed*, (Dec. 19, 1997):

> Maybe there is an inner core of sovereign functions, such as the balance of power between governor and state legislature, that if somehow imperiled by the ADA would be protected by the clear-statement rule, but the mere provision of public services, such as schools and prisons, is not within that inner core.

[24]Title II is not *per se* ambiguous just because some courts have strained to find ambiguity where none exists.

[25] By contrast, the statute at issue in *Gregory* (the ADEA) was "sweeping on its face, and our task was to construe an exception from that otherwise broad coverage." *Evans v United States*, 504 U.S. 255, 294, n.8 (1992) (Thomas J., dissenting). The court invoked the clear statement rule only because the exception – for "an appointee on the policy making level" – was susceptible of two plausible constructions. *Gregory*, 501 U.S. at 456.

Crawford, 115 F.3d at 485.

Furthermore, the ADA expressly requires that the Act be construed to provide at least the protections available under the standards and regulations of the Rehabilitation Act. In its deliberations on the ADA, Congress took great pains to study § 504 of the Rehabilitation Act to determine its inadequacies and make changes where it thought appropriate.[26] By the time Congress enacted the ADA, every court considering the question had ruled that the Rehabilitation Act applied to prisons,[27] and the Department of Justice had promulgated regulations setting forth the requirements imposed by the Act in prison.[28] This Court had also

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[26]The report of the Committee on Energy and Commerce, for example, in explaining the origins of Title II, stated:

> Seventeen years of experience with section 504 - in the development and issuance of regulations, guidelines, and standards, in the implementation of those requirements, and in the interpretation of the law - have demonstrated the need for further legislative action in this area.

H.R. 104-485, 101 Cong., 2d Sess., pt. 4, at 24.

[27]*Bonner v. Lewis*, 857 F.2d 559 (9th Cir. 1988); *Journey v. Vitek*, 685 F.2d 239, 242 (8th Cir. 1982); *Baker v. Seabold*, No. 87-5486, 1987 WL 38691 (6th Cir. Oct. 15, 1987); *Sites v. McKenzie*, 423 F.Supp. 1190 (N.D. W.Va.1976). *See also LaFaut v. Smith*, 834 F.2d 389 (4th Cir. 1987) (vacating as moot judgment of district court that prison officials violated Rehabilitation Act).

[28]*See* 28 C.F.R. § 42.540(h) (program includes a "department of corrections"); 28 C.F.R. § 39.170(d)(ii) (setting forth procedure for prisoner to file a complaint). Significantly, this regulation was submitted to Congress during its consideration of the ADA. Further, the ADA requires the Attorney General to promulgate regulations governing "program accessibility, existing facilities" that are consistent with the Rehabilitation Act regulations set forth in 28 C.F.R. Part 39, 42 U.S.C. § 12134(b). In turn, 28 C.F.R. Part 39.150, which governs "program accessibility, existing facilities", mandates that state agencies covered by the Rehabilitation Act "meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. §§ 4151-4157), and any regulations implementing it." At the time the ADA was passed, the regulations promulgated under the Architectural Barriers

repeatedly emphasized that the federal regulations are "an important source of guidance on the meaning of § 504." *School Bd. of Nassau County*, 480 U.S. at 279 (quoting *Alexander v. Choate*, 469 U.S. 287, 304 n.24 (1985)). There is nothing in either the text or legislative history of the ADA to suggest that Congress disapproved of the application of the Rehabilitation Act to prisons, or that it wished the ADA to be interpreted differently.

Application of Title II to persons in State prisons is consistent with other civil rights legislation passed by Congress, such as the Civil Rights Institutionalized Persons Act (CRIPA), which empowers the U.S. Attorney General to initiate civil actions to protect the constitutional and statutory rights of persons residing in institutions, including correctional facilities. 42 U.S.C. 1997 (1)(B)(ii). Although Congress amended CRIPA in 1997 to limit prisoner litigation, it could have, but did not seek to eliminate the ADA from the scope of its protection. The broad language of Title II also parallels that in other federal anti-discrimination statutes, such as Title VI and Title IX of the Civil Rights Act and the Individuals with Disabilities Education Act, that have been applied to correctional facilities. See *Jeldness v. Pearce*, 30 F.3d 1220 (9th Cir. 1994) (Title IX); *Franklin v. District of Columbia*, 960 F.Supp. 394, 432 (D.C. D.C. 1997) (Title VI); *Alexander S. v. Boyd*, 876. F. Supp. 773 (D. S.C. 1995) (IDEA).

D. Title II Does Not Permit Exclusions or Exceptions for Certain State Entities, Services, Functions, or Locations

The petitioners contend that because prison management is a

Act included the Uniform Federal Accessibility Standards accessibility guidelines, then set forth in 24 C.F.R. Part 40, App. A (1989), which, at § 4.1.4(9)(c), explicitly refer to "detention or correctional facilities."

core function traditionally left to the discretion of the States, the Court should invent an exception from Title II specifically for this State program. Although there is no question that prison management is one of a state's most significant responsibilities, it is no more vital than any other important government function, such as education, public health, voting, child protection services, or the courts, all of which are routinely understood to be covered by both the ADA and the Rehabilitation Act.[29] The interpretative strategy urged by the petitioners lacks rational boundaries and could eviscerate Title II if it were applied to remove other important State programs and services from the scope of the ADA.

As this Court recognized in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 539 (1985), it is "difficult, if not impossible, to identify an organizing principle" to distinguish those federal statutes that "trench on traditional governmental functions" from those that do not. Petitioners' approach could therefore threaten to exclude significant segments of State and local governmental activities from the reach of other federal statutes, such as Title VI, Title VII and Title IX of the Civil Rights Act of 1964. This would require the reversal of an enormous body of settled law, since federal courts have regularly applied civil rights statutes that are phrased in general terms to a variety of governmental activities that could be characterized as "core state functions." See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *EEOC v. Wyoming*, 460 U.S. 226 (1983).

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[29]*See, e.g., Crowder v. Kitagwa*, 81 F.3d at 1480, 1485 (9th Cir. 1996) (state public health and safety legislation); *Galloway v. Superior Court of Dist. of Columbia*, 816 F. Supp. 12, 15 (D.C. 1993) (courts and jurors); *Eric L. v. Bird*, 848 F.Supp. 303 (D. N.H. 1994) (state foster care services). This Court has also concluded that § 504 of the Rehabilitation Act applies to public schools and public health, *School Bd. of Nassau County*, 480 U.S. 273 and medical care, *Alexander*, 469 U.S. 287.

Like prisons, a number of essential State entities are not specifically mentioned by Title II, do not always provide services to people who participate voluntarily, and are not necessarily open to the general public. For example, every day thousands of individuals with disabilities have business in the state courts -- both civil and criminal -- as parties, witnesses, jurors, employees, or citizens observing the proceedings. Yet Title II makes no explicit mention of the courts, and they are not expressly referred to in any of the Congressional Findings.[30] Further, many psychiatric and forensic facilities provide mental health and restoration services to committed patients in locked settings that are closed to the public. The same is true of developmental centers for persons with retardation that provide custodial and rehabilitation services to involuntarily confined residents. Many other government programs, such as State operated group homes, public health hospitals, child protection services, and numerous government offices, are well within the scope and purpose of Title II even though not open to the public in any meaningful sense.

Even within the general category of law enforcement, it might be difficult to carve out an exemption limited to state prisons. Other state law enforcement programs, such as forensic hospitals, juvenile delinquency programs, community corrections, treatment centers for sex offenders who have completed their sentences, probation, parole, and jails could arguably be

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[30]Many other examples of core state functions that are not explicitly listed in either Title II or in the Congressional Findings demonstrate the fallacy of petitioners' tortured reading of Title II. Could a fire department allow an unwanted group home for people with mental retardation to burn to the ground without risking a lawsuit under the ADA? Are police free to ignore crimes committed against the disabled? Could a state legislature bar people with cerebral palsy from its galleries because it thought them too disturbing to look at? None of these state entities are mentioned by name in Title II.

excluded.[31] Whether the ADA was applicable or not could depend on whether the program at issue was run by the department of correction or a separate state agency in that particular state. For example, Congress clearly intended that facilities like Atascadero State Hospital -- a maximum security forensic institution operated by the California Department of Mental Health -- be covered by the Rehabilitation Act and the ADA.[32] Yet in many states identical facilities are run by the Department of Correction even though they can hold patients who have not committed any crime.[33] Petitioners' concession that certain activities within the prison, such as visiting rooms and administrative buildings, are properly within the reach of Title II further illustrates the difficulties and arbitrariness of the effort to write exemptions into Title II that have no basis in its textual language.

There is nothing "absurd" or at odds with the purposes of the ADA to extend its protections to prisoners. *See Crawford*, 115 F.3d at 485-487. Just as the prohibition of discrimination on the basis of race applies to the segregation of prisoners, *Lee v. Washington*, 390 U.S. 333 (1968), it is reasonable to proscribe discrimination on the basis of disability in the programs available in

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[31]Although jails primarily hold people who are awaiting trial and presumed innocent, forty-five states use jails to detain people with mental illness who are waiting for a psychiatric evaluation or mental health services in the community, and have not even been charged with a crime. See Joint Report of the National Alliance for the Mentally Ill and Public Citizen's Health Group, *Criminalizing the Seriously Mentally Ill: The Abuse of Jails as Mental Hospitals* (1992).

[32]Congress responded to this Court's decision in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985), by amending the Rehabilitation Act to ensure that discrimination of the sort alleged in that case would be covered. Moreover, the ADA includes a waiver of sovereign immunity, 42 U.S.C., § 12202, that was expressly designed to comply with standards set forth in *Atascadero*. S.Rep. No. 101-116, 101st Cong., 1st Sess. at 86.

[33]*See, e.g., Doe v. Gaughan*, 808 F.2d 871 (1st Cir. 1986) (describing Bridgewater State Hospital in Massachusetts).

state correctional facilities. Prisoners suffer from the same wide range of disabilities experienced by individuals with disabilities in the community. Some use wheelchairs, some are blind, mentally retarded, or deaf, and others suffer from AIDS, epilepsy, mental illness, diabetes, or cerebral palsy. Within the prison environment, they are vulnerable to identical, if not worse, discrimination and oppression than that faced by people with disabilities in the community or other institutional settings.[34] This may include intentional mistreatment resulting from bias and stereotypes, as well as the denial of the opportunity to participate in programs, services, and activities within the prison. For example, a deaf prisoner who cannot communicate with the prison doctor about a medical issue is in exactly the same desperate position as a deaf person in a psychiatric institution with a similar need. Both are at a considerable disadvantage compared to a deaf person in the community who has the option of seeking another doctor. Similarly, a prisoner who cannot access rehabilitative programs because he uses a wheelchair, and therefore cannot earn "good time" or satisfy the prerequisites of the parole board, suffers the same harm as a person with the identical disability who remains unnecessarily institutionalized because she cannot attend vocational programs in a mental hospital.

Application of Title II of the ADA to prisons is no more complex nor no less critical than it is in any other institution where people are held involuntarily and virtually every aspect of their lives is controlled. Most of the problems facing individuals with disabilities have exactly the same solutions in prison as in the

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[34]Ira P. Robbins, *George Bush's America Meets Dante's Inferno: The Americans with Disabilities Act in Prison*, 15 Yale L. & Pol'y Rev. 49 (1996). *See also Parrish v. Johnson*, 800 F.2d 600, 605 (6th Cir. 1986) (prison guard repeatedly assaulted paraplegic inmates with knife, forced them to sit in own feces, and taunted them with remarks like "you crippled bastard you should be dead").

community: make buildings and bathrooms accessible, provide interpreters and auxiliary communication devices, and ensure that persons with disabilities are not arbitrarily excluded from programs or services by eligibility requirements produced by erroneous stereotypes.[35] Nor are prisons unique in confronting conflicts between competing goals in the management of difficult people. Similar conflicts arise whether the institution is a conventional mental hospital where patients may be both violent and mentally ill, or an institution for people with mental retardation where fiscal constraints make it difficult to satisfy the treatment and habilitation needs of all residents. Even in a state university, the administration faces complicated operational and budgetary issues that affect every aspect of the daily lives of the students, staff, and faculty.

The ADA does not require prison administrators, anymore than any other public official, to do anything that is unreasonable or unduly burdensome or that would fundamentally alter its programs. What is "reasonable" will depend on the circumstances, and in the prison context, important management concerns such as security are "highly relevant to determining the feasibility of the accommodations disabled prisoners need in order to have access to desired programs and services." *Crawford*, 115 F.3d at 487.[36]

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[35]Many of the accommodations required by the ADA are also mandated by the Constitution. *See, e.g., LaFaut v. Smith*, 834 F.2d at 394 (finding unconstitutional, in an opinion written by retired Supreme Court Justice Powell, the failure to provide paraplegic inmate with handicap toilet in cell and work area); *Ruiz v. Estelle*, 503 F.Supp. 1265, 1346 (S.D.Tex. 1980), *aff'd in part and rev'd in part*, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983) (mentally retarded prisoners facing disciplinary charges must be provided with "counsel substitute" under *Wolff v. McDonnell*, 418 U.S. 539, 570 (1974), even though non-disabled inmates have no such right).

[36]Courts have consistently applied Title I of the ADA to employment of prison guards by taking into account prison management and security concerns. *See, e.g., Allison v. Dep't of Corrections*, 94 F.3d 494 (8th Cir. 1996).

Thus, the ADA will no more wreak havoc within the prison system than it has in any other state program.

CONCLUSION

Amici curiae ask this Court to focus on the harm that occurred when the Pennsylvania department of corrections denied Ronald Yeskey, a person with a disability, solely on the basis of his disability, equal access to a program authorized by the General Assembly. The Legislature's charge to the Department of Corrections was to implement the State Motivational Boot Camp program. The Legislature authorized a program to rehabilitate youthful offenders by providing them, *inter alia*, continuing education, vocational training and pre-release counseling as a hedge against reincarceration. Ronald Yeskey's participation in a program, authorized by legislation and implemented by the department, does not impinge on the State's authority to manage its correctional facilities.

Petitioners have taken a hard line in pressing their asserted right to determine who can and cannot participate in the program. Petitioners have made no claim that Mr. Yeskey was not in all respects, save his disability, an appropriate candidate for the program. To its discredit, petitioners did and continues to seek relief from the judiciary to continue the unequal treatment that the States spoke with a single voice to eradicate.

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ADDENDUM
DESCRIPTIONS OF AMICI CURIAE

The National Advisory Group for Justice (NAG) is a Project of National Significance funded by the Administration for Developmental Disabilities, U.S. Department of Health and Human Services to assist that federal agency in fulfilling its mandate to prevent discrimination against persons with developmental disabilities. Persons with developmental disabilities, whether accused of, victims of, or witnesses to crimes, are denied full access to the services, supports and programs in the criminal justice system to the same degree as their non-disabled peers. The NAG was established, therefore, to examine nationwide legal trends in the criminal justice system as they affect persons with developmental disabilities and directs its resources to the enforcement of the Americans with Disabilities Act. The NAG seeks reasonable accommodations for persons with disabilities throughout the criminal justice system.

The grantee organization, the Public Interest Law Center of Philadelphia (PILCOP), is a non-profit law firm established in 1974 which has responded on a national level to the needs of persons with disabilities. For more than 25 years, PILCOP has maintained close and productive working relationships with disability rights organizations and is well-known for its mission. With Self Advocates Becoming Empowered (SABE), a national, non-profit, grassroots organization of Self-advocates, PILCOP implements the NAG's programs.

The American Foundation for the Blind's (AFB) mission is to enable persons who are blind or visually impaired to achieve equality of access and opportunity that will ensure freedom of choice in their lives. AFB accomplishes this mission by taking a national leadership role in the development and implementation of public policy and legislation, informational and educational

programs, and quality services.

The Disability Rights Council of Greater Washington (DRC), established in 1992 as a regional advocacy organization, addresses systemic discrimination against people with disabilities in every aspect of society. The DRC's goals are to promote, secure and protect the full participation of people with disabilities in the community, which the DRC believes will strengthen society as a whole.

The National Alliance for the Mentally Ill (NAMI) is a national organization of families of people with severe mental illnesses and people with severe mental illnesses themselves. Comprised of 172,000 members and more than 1,100 affiliates nationwide, NAMI's goals are to educate the public about severe mental illnesses such as schizophrenia, manic-depressive illness and major depression as treatable brain disorders, and to advocate for the advancement of treatment services for people with these disorders. An important part of NAMI's mission is to advocate on behalf of people with severe mental illnesses involved in the criminal justice systems. In this capacity, NAMI, along with Public Citizens' Health Research Group, published a report in 1992 entitled Criminalizing the Seriously Mental Ill that documented the serious treatment needs of people with severe mental illness who are inmates in jails and prisons.

The National Association of People with AIDS (NAPWA), founded in 1983, advocates on behalf of all people living with HIV and AIDS in order to end the pandemic and the human suffering caused by HIV/AIDS.